CAUSE NO. GV 204523

THE STATE OF TEXAS,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
v.	§	**TRAVIS COUNTY, TEXAS**
	§	
AMCARE HEALTH PLANS OF TEXAS, INC. and AMCARE MANAGEMENT, INC.	§	
	§	
	§	**200th JUDICIAL DISTRICT**
Defendants.		

AMENDMENT TO MOTION OF MEDIMPACT HEALTHCARE SYSTEMS, INC. FOR RELIEF FROM STAY AND MODIFICATION OF INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

MedImpact Healthcare Systems, Inc. ("MedImpact") respectfully submits the following amendment to its previously filed motion seeking relief from the automatic stay imposed by § 21A.008(c)(1) of the Insurance Code and a modification of the injunction imposed by this Court's Permanent Injunction and Order Appointing Permanent Receiver signed on January 21, 2003 (the "Injunction Order"). MedImpact files this amendment to modify the relief requested in the original motion (as amended hereby, the "Amended Motion"), as set forth more fully below. In support of this amendment and the Amended Motion, MedImpact would show the Court as follows:

I.

RELIEF SOUGHT

1. In its previously filed motion, MedImpact requested relief from the automatic stay and a modification of the Injunction Order and an order compelling the Special Deputy Receiver (the "SDR") for AmCare Health Plans of Texas, Inc. ("AmCare-TX") to arbitrate the SDR's

informally asserted allegation that MedImpact overcharged the SDR under a pharmacy benefits management Service Agreement (the "Agreement"). MedImpact entered into the Agreement with AmCare-TX and two of its affiliates, AmCare Health Plans of Oklahoma ("AmCare-OK") and AmCare Health Plans of Louisiana ("AmCare-LA) (collectively, the "AmCare Entities."). The Agreement was entered into long before the AmCare Entities were placed into insolvency proceedings by insurance officials in their respective states of incorporation.

2. By this amendment, MedImpact seeks substantially the same relief by a different procedural path. As more fully set forth below, MedImpact now seeks an order modifying the stay and the Injunction Order so as to permit MedImpact to file such motions and other papers as are necessary or appropriate to join the SDR in a lawsuit initially filed by the Oklahoma Receiver of AmCare-OK and the Louisiana Liquidator of AmCare-LA, as co-plaintiffs, in an Oklahoma state court; MedImpact has removed that lawsuit (the "Oklahoma Lawsuit")[1] to the United States District Court for the Western District of Oklahoma (the "Oklahoma Federal Court").[2] If MedImpact is able to join the SDR in the Oklahoma Lawsuit, MedImpact would seek an order from the Oklahoma Federal Court compelling all of the parties to arbitrate the overcharging and related allegations against MedImpact. Thus, by this Amended Motion, MedImpact seeks to sever and abate that portion of the original motion that sought an order compelling arbitration. MedImpact would renew its motion to compel arbitration in this Court only if the SDR is not joined as a party in the Oklahoma Lawsuit.

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[1] *State of Oklahoma ex rel. Kim Holland, Commissioner of Insurance for the State of Oklahoma, as Receiver for AmCare Health Plans of Oklahoma, Inc., and James Donelon, Acting Commissioner of Insurance for the State of Louisiana, in his capacity as Liquidator of AmCare Health Plans of Louisiana, Inc., in Liquidation, Plaintiffs vs. MedImpact Healthcare Systems, Inc., Defendant*, U.S. Dist. Ct. Case No. CIV-06-529-T (W.D. Okla.).

[2] The plaintiffs in that action have filed a motion to remand the lawsuit to state court. The remand motion is fully briefed, but no hearing on the motion has been set, nor has any ruling been issued.

3. MedImpact herewith incorporates by reference the original motion that it filed, together with the exhibits thereto. This amendment supersedes the original motion only to the extent that the two are inconsistent.

4. MedImpact anticipates that, should this Court grant relief from the Injunction Order and the stay, MedImpact would file a motion or motions in the Oklahoma Federal Court under Rules 14 and 19 of the Federal Rules of Civil Procedure ("FRCP") for leave to file a declaratory cross-complaint against the SDR and/or to join the SDR as a defendant in that lawsuit, with a subsequent request to realign the SDR as a plaintiff.[3] Should the SDR elect not to file an affirmative claim against MedImpact in the Oklahoma Lawsuit, the SDR would, at a minimum be defending against MedImpact's contention that MedImpact is not liable for overcharging. If the Oklahoma Federal Court grants the arbitration motion, the issues will be determined by arbitration. If the Oklahoma Federal Court denies the arbitration motion, the issues will be determined by trial in that court. One way or another, the overcharging allegations will be resolved for all the receivers or liquidators of all the AmCare Entities and for MedImpact in a single proceeding in a single forum. If for any reason the Oklahoma Federal Court refuses to permit the joinder of the SDR in that action, however, MedImpact would renew its application to this Court for an order compelling arbitration.

5. A motion for an order compelling arbitration is presently pending in the Oklahoma Federal Court, but that court has agreed to stay its consideration of that motion until MedImpact exhausts its efforts to have the SDR joined as a party in the Oklahoma Lawsuit. If

[3] Joining a party as a defendant and then realigning her as a plaintiff is specifically contemplated by FRCP 19(a) and is entirely proper. *Commercial Union Ins. Co. v. Cannelton Indus., Inc.*, 154 F.R.D. 164, 168 (W.D. Mich. 1994); *Bonar, Inc. v. Schottland*, 631 F. Supp. 990, 999-1000 (E.D. Pa. 1986). This sort of procedure is distinct from joining a party as an involuntary plaintiff in the proper sense.

joinder is ordered, the SDR would be given an opportunity to brief and be heard on MedImpact's motion to compel arbitration. [**Exhibit "C"** attached to MedImpact's original motion][4] The current plaintiffs in the Oklahoma Lawsuit have opposed MedImpact's motion to compel arbitration, and the SDR would obviously be given the chance to do likewise.

6. MedImpact certainly is not requesting this Court to order the SDR to participate in the Oklahoma Lawsuit, nor is MedImpact asking this Court to rule on the FRCP 14 and/or 19 motion(s) that MedImpact anticipates filing in the Oklahoma Federal Court. MedImpact is not asking this Court, at least at this stage, to rule on the question whether the arbitration clause is enforceable against the SDR or whether the Federal Arbitration Act (the "FAA") is reverse preempted by virtue of the McCarran-Ferguson Act (the "MFA"). MedImpact is merely requesting that this Court clarify and, to the extent necessary, modify the automatic stay and the Injunction Order to eliminate any risk of sanctions that might otherwise be imposed on MedImpact because of the steps that MedImpact proposes to take in the Oklahoma Lawsuit. The Oklahoma Federal Court is the tribunal that should decide the merits of MedImpact's motion(s) to join the SDR, the motion to compel arbitration, and related matters. This Court, however, has plenary authority over the automatic stay and this Court's own Injunction Order.[5]

7. As noted above, the plaintiffs in the Oklahoma Lawsuit have moved the Oklahoma Federal Court for an order remanding the action to an Oklahoma state court.

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[4] The arbitration motion also seeks an order transferring venue of the action to the Southern District of California, but in subsequent filings, MedImpact has advised the Oklahoma Federal Court that it would be content to have the question of venue deferred until: (a) that court determines whether to order arbitration; (b) if arbitration is ordered, the American Arbitration Association decides the locality of the arbitration; and (c) only if the locality is determined to be in some state other than Oklahoma would MedImpact renew its motion concerning venue, as might be appropriate under the circumstances.

[5] *But see* the discussion in Part III.A., *infra*.

Although MedImpact believes it is unlikely that this motion will be granted, the relief MedImpact requests in this Amended Motion should contemplate that possibility and provide that, if remand is ordered, MedImpact is nonetheless granted leave to seek the joinder of the SDR in the remanded action and to seek an order from the Oklahoma state court compelling the SDR to arbitrate the claims relating to the overcharging dispute.

8. Whether the dispute is resolved in arbitration or in a federal or state court proceeding, should the resolution include a determination that AmCare-TX, the SDR, or the estate in the above-captioned case owes money to MedImpact, the determination of the validity and amount of such claim would be binding in the instant receivership case, but MedImpact would seek recovery or treatment of such claim only in this Court and only in accordance with the provisions of the Insurer Receivership Act.

II.

BACKGROUND

9. As MedImpact has previously explained, MedImpact is a pharmacy benefits management ("PBM") company that entered into the Agreement **[Exhibit "A"** to MedImpact's original motion] to provide PBM services to the AmCare Entities Under the Agreement, the rights and obligations of the three AmCare Entities were joint, not individual or separate. The Agreement refers to the three AmCare Entities collectively in the singular as the "Health Plan." MedImpact owed all of its contractual obligations to the three AmCare Entities collectively, not individually. Likewise, the three AmCare Entities were jointly and severally liable to MedImpact for the payments due under the Agreement. Indeed, in an unrelated action against HeathNet, the ultimate parent of the AmCare Entities, the SDR has pled and, presumably, proven

that the parties in control of the AmCare Entities "operated the AmCareCo entities in a coordinated fashion and those entities became and were operated as a single business entity."[6]

10. Article IX of the Agreement requires the two sides to submit any dispute that they cannot resolve to binding arbitration.

11. All three AmCare Entities are now insolvent and have been placed in receivership or liquidation proceedings in their respective states of incorporation (Texas, Oklahoma, and Louisiana). Over the course of the past several months, the liquidators or receivers for the three AmCare Entities have separately and together asserted that they hold claims for damage against MedImpact based upon the contention that MedImpact overcharged and was overpaid by the AmCare Entities under the Agreement. Those allegations were formalized and are being prosecuted by the Oklahoma Receiver for AmCare-OK and the Louisiana Liquidator for AmCare-LA, as co-plaintiffs, in the Oklahoma Lawsuit. Apparently, the plaintiffs in that action elected not to invite the SDR to participate in the lawsuit, and the SDR has made no effort to intervene in that proceeding.

12. The only formal proceedings between the SDR and MedImpact arise out of the proof of claim that MedImpact filed with the SDR seeking payment of the unpaid amounts jointly and severally due from the AmCare Entities under the Agreement. The SDR denied the claim, and MedImpact filed an Objection in accordance with § 21A.253(c) of the Insurance Code. **[Exhibit "B"** to MedImpact's original motion] The SDR has not filed any motion,

[6] A copy of the petition in that action is attached hereto as **Exhibit 1**. The claims alleged in that complaint ultimately were tried to a jury in Louisiana. The jury rendered a verdict, which, as modified by the trial judge, became a judgment of approximately $110,000,000 in favor of the SDR. The judgment is currently on appeal.

application or complaint for an adjudication of the merits of MedImpact's claim or the SDR's denial thereof.

13. Although the SDR gave no formal explanation for denying MedImpact's claim, she has, through counsel, informally advised MedImpact that she, like her Oklahoma and Louisiana counterparts, believes that MedImpact has overcharged and has been overpaid under the Agreement. The SDR has advised MedImpact that she has the same sorts of claims (if not exactly the same claims) asserted by the Oklahoma Receiver and the Louisiana Liquidator.

14. Because the asserted and unasserted claims of all three receivers or liquidators arise under the same contract and the same set of operative facts, MedImpact has been attempting to coordinate a formal resolution of both the formally asserted claims of the Oklahoma Receiver and the Louisiana Liquidator and the unasserted but threatened claims of the SDR in a single proceeding. Until now, MedImpact has been content to seek such resolution by parallel motions in this Court and in the Oklahoma Federal Court to compel the respective liquidators or receivers to arbitrate the disputes.

15. MedImpact has reevaluated the wisdom of proceeding with parallel motions in two separate courts. Although MedImpact is confident of its right under applicable law to have all disputes under the Agreement resolved through arbitration, the possibility that this Court and the Oklahoma Federal Court might come to different conclusions on the question of the enforceability of the arbitration clause strongly suggests that the issue should be resolved by only one court for all three receivers or liquidators. For example, if this Court compels arbitration but the Oklahoma Federal Court does not, it will be much more difficult to coordinate and consolidate the resolution of disputes under the Agreement. The same would be true if this

Court denies but the Oklahoma Federal Court grants the respective motions to compel arbitration.

16. Moreover, it is at least theoretically possible that both courts might deny the motions to compel arbitration before them. If that were to occur, MedImpact would nonetheless want to have the asserted and unasserted claims against it resolved in single proceeding, albeit a single judicial proceeding, by the joinder of the SDR in the Oklahoma Lawsuit as either a defendant (subsequently realigned as a plaintiff) under FRCP 19, or as a defendant in a cross-complaint to be filed with leave of court under FRCP 14. In such a cross-compliant MedImpact, as cross-plaintiff, would seek a declaration against the SDR that, *inter alia*, MedImpact did not overcharge AmCare-TX.

17. Consolidation of the disputes under the Agreement in a single proceeding before the Oklahoma Federal Court will thus eliminate the risk of inconsistent rulings on the question of the enforceability of the arbitration clause, including arguments that the FAA is reverse preempted by virtue of the MFA. Such a step would also ensure that, whether or not arbitration is compelled, all the relevant parties will be joined in a single proceeding to resolve the disputes arising under or related to the Agreement.

18. The relief requested by this Amended Motion is simply a request that this Court grant to MedImpact relief from stay so that: (a) MedImpact can file with the Oklahoma Federal Court (or the Oklahoma state court, should remand be ordered) a motion or motions seeking the joinder of the SDR under any applicable rule or statute; and (b) if such a motion or motions are granted, join the SDR in and litigate its rights and contentions against the SDR (including its motion to compel arbitration) in the Oklahoma Lawsuit (and in any arbitration ordered by the Oklahoma Federal Court or an Oklahoma state court, should remand be ordered) without risking

the imposition of sanctions by this Court. If the litigation or arbitration results in a determination that, net of all setoffs and counterclaims, MedImpact is owed money under the Agreement by one or more of the AmCare Entities, MedImpact will then seek the payment of its claim in this Court and the receivership courts of Louisiana and Oklahoma, as appropriate, asking for its share of the rest of the receivership estates according to the applicable insurance receivership laws.

III.

ARGUMENT AND AUTHORITIES

A. RELIEF FROM STAY SHOULD BE GRANTED TO CLARIFY THAT THE AUTOMATIC STAY AND THIS COURT'S INJUNCTION WERE NOT INTENDED TO VIOLATE THE WELL ESTABLISHED RULE THAT A STATE DOES NOT HAVE THE POWER TO ENJOIN A FEDERAL COURT ACTION BY LEGISLATIVE ACT, JUDICIAL DECREE OR OTHERWISE.

19. When this Court issued its injunctive orders, it could hardly have anticipated that a party in MedImpact's position would be defending a lawsuit in a federal court in another state that was commenced by only two of the three AmCare receivers under a contract made by all three AmCare Entities, operating as a single health plan. It is, therefore, doubtful, that this Court actually intended to restrain a party in MedImpact's position from seeking to join the SDR in such a federal action. Nonetheless, the language of the injunction and, indeed the automatic stay provisions of Texas Insurance Code, TEX. INS. CODE § 21A.008(c)(1), arguably are broad enough to at least purport to restrain MedImpact from attempting to attempt to join the SDR in the Oklahoma Lawsuit and, in that action, seeking an order compelling the SDR to arbitrate the disputes with MedImpact. Paragraph 13 of the Injunction Order enjoins "persons asserting claims against AmCare Health Plans of Texas, Inc.," from, among other things: ". . . commencing or prosecuting any action or appeal, including but not limited to arbitration and administrative proceedings . . . or asserting any claims against Defendants or the Permanent

Receiver, except as permitted by Tex. Ins. Code Ann. Art 21.28 and orders of this Court entered thereunder." Similarly, Section 21A.008 of the Insurance Code provides that

> (c) the commencement of a delinquency proceeding under this chapter operates as a stay, applicable to all persons, of:
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the insurer, including an arbitration proceeding, that was or could have been commenced before the commencement of the delinquency proceeding under this chapter, or to recover a claim against the insurer that arose before the commencement of the delinquency proceeding under this chapter . . . .

TEX. INS. Code, § 21A.008(c)(1).[7]

20. Nonetheless, it would be a mistake to conclude that either the automatic stay of § 21A.008(c) or this Court's Injunction Order can oust the jurisdiction of the Oklahoma Federal Court or deprive MedImpact of the right to join the SDR in the pending federal action. First, § 21A.008(c) cannot be interpreted to diminish federal diversity jurisdiction or to undermine MedImpact's right to resort to a federal court. As early as 1857, the Supreme Court noted that it had "repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power." *Hyde v. Stone*, 61 U.S. (20 How.) 170, 175, 15 L. Ed. 874 (1857).

21. In particular, state statutes that vest a certain state court with exclusive jurisdiction over a particular *res* such as a decedent's estate, a trust, or a receivership estate

[7] Inasmuch as MedImpact's declaratory relief claim did nor arise before the delinquency proceedings were commenced, it is at least arguable that prosecution of the declaratory relief claim would not violate the automatic stay.

cannot oust a federal court of jurisdiction to entertain an *in personam* action based on diversity of citizenship against the court officer in charge of the *res* in that officer's representative capacity, nor can state statutes deprive a litigant of the right to bring such an action. *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43-44, 30 S. Ct. 10, 12, 54 L. Ed. 80 (1909); *accord Clark v. Bever*, 139 U.S. 96, 102, 11 S. Ct. 468, 470, 35 L. Ed. 88 (1891) (rejecting as constitutionally unsound the argument that a state can "by legislative enactment conferring upon its own courts exclusive jurisdiction of all proceedings or suits involving the settlement and distribution of ... estates ... exclude the jurisdiction of the courts of the United States even in cases where the constitutional requirement as to citizenship is met."); *Green's Adm'x v. Creighton*, 64 U.S. (23 How.) 90, 107-08, 16 L. Ed. 419 (1859) (holding that, on the basis of diversity, a creditor "may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates.").

22. The potential for inconvenience to a court officer such as the SDR is of no moment in the analysis. As the Supreme Court has explained:

> [N]either the principle of convenience nor the statutes of a State can deprive [federal courts] of jurisdiction to hear and determine a controversy between citizens of different states when such a controversy is distinctly presented because the judgment may affect the administration or distribution in another forum of the assets of the ... estate.

Hess v. Reynolds, 113 U.S. 73, 77, 5 S. Ct. 377, 378, 28 L. Ed. 927 (1885).

23. These principles are fully applicable in insurance receivership cases. State statutes purporting to prohibit litigation in another forum while the receivership proceeding is pending cannot deprive a federal court of jurisdiction to entertain an *in personam* action against

an officer such as the SDR or deprive a party such as MedImpact of the right to resort to a federal court on the basis of diversity. *Gross v. Weingarten*, 217 F.3d 208, 220-21 (4th Cir. 2000).

24. Likewise, the Injunction Order cannot oust the Oklahoma Federal Court of jurisdiction or cut off MedImpact's right to seek an adjudication against the SDR in a federal court. The United States Supreme Court has repeatedly held that "state courts are completely without power to restrain federal court proceedings in *in personam* actions," even if the injunction is addressed to the parties rather than the federal court itself. *Donovan v. City of Dallas*, 377 U.S. 408, 413, 84 S. Ct. 1579, 1582, 12 L. Ed. 2d 409 (1964); *accord Moses H. Cohn Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 21 n. 24, 103 S. Ct. 927, 940 n. 24, 74 L. Ed. 2d 765 (1983); *see General Atomic Co. v. Felter*, 434 U.S. 12, 16, 98 S. Ct. 76, 78, 54 L. Ed. 2d 199 (1977) (holding that the rule of *City of Dallas v. Donovan* applies irrespective of whether the state court injunction is issued before or after the federal court filing). Likewise, the Texas Supreme Court has repeatedly held that the courts of this state have no right or authority to enjoin litigation in federal courts. *Ex parte Evans*, 939 S.W.2d 142, 143-44 (Tex. 1997); *Gannon v. Payne*, 706 S.W.2d 304, 305 (Tex. 1986). "[F]ederal courts are beyond the reach of Texas injunctions." *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987).

25. The rule that a state court injunction cannot deprive a federal court of jurisdiction or prevent a party from resorting to a federal court is just as valid with respect to insurance receiverships as for any other situation. *Gross*, 217 F.3d at 921; *Corporacion Insular de Seguros v. Munoz*, 896 F. Supp. 233, 237 (D.P.R. 1995). This has been recognized in Texas. In *Bodine v. Webb*, 992 S.W.2d 672, 676 (Tex. App. — Austin 1999, pet. denied), the Austin Court of Appeals (Aboussie, C.J.) held that an *in personam* action against the special deputy receiver in

his representative capacity in a federal court was beyond the power of the Texas receivership court to enjoin.

26. The bottom line is clear. MedImpact has an undoubted right to require the SDR to resolve MedImpact's claims, defenses and arbitration demand under the Agreement in an Article III federal tribunal. That right cannot be abrogated even by an Act of Congress, *see Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982), much less by a state statute or the order of a state court. It is, of course, possible that the Oklahoma Federal Court might deny MedImpact's motion to join the SDR pursuant to FRCP 14 and/or FRCP 19.[8] It might entertain arguments that it should abstain from exercising its jurisdiction. *See Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996). The Oklahoma Federal Court might permit the SDR to be joined but then deny MedImpact's motion to compel arbitration. Neither this Court's Injunction Order nor § 21A.008(c) of the Insurance Code, however, may prevent the Oklahoma Federal Court from determining whether and how to exercise jurisdiction.

27. MedImpact, of course, has no desire to test the power of this Court by simply assuming that the scope of the automatic stay and this Court's Injunction Order will be construed to comport with federal law. Indeed, as the *Donovan* case teaches, a litigant who ignores even an improper state court order that restrains the litigant from bringing a claim in a federal court nonetheless runs a serious risk of being sanctioned by the state court. *Donovan*, 377 U.S. at 411-

[8] If the Oklahoma Federal Court does deny MedImpact's request(s) to join the SDR, MedImpact might obtain the dismissal of the Oklahoma lawsuit under FRCP 12 (b)(7) on the ground that the SDR is an indispensable party under FRCP 19. When the inability to join an indispensable party in a federal forum arises from the supposed force of a state court injunction, however, then the injunction must yield. The state injunction may not deprive a litigant of its right to pursue an action in a federal forum by preventing the joinder of an indispensable party. *General Atomic*, 434 U.S. at 18 n.11, 98 S. Ct. at 79 n.11.

12, 84 S. Ct. at 1582; *see* TEX. INS. CODE § 21A.008(k).[9] Whether or not, as in *Donovan*, a federal court ultimately would vacate a state court sanctions order, MedImpact would much prefer simply to obtain from this Court an order which clarifies and, to the extent necessary, modifies the Injunction Order and the automatic stay to comport with the *Donovan* rule.

28. Moreover, even if the Oklahoma Federal Court were to order the remand of the action to Oklahoma state court, this Court should nonetheless modify its Injunction Order and the automatic stay to permit MedImpact to attempt to join the SDR in the remanded proceedings using the functionally equivalent procedural devices available under Oklahoma state law. Admittedly, it is not improper *per se* for a Texas court (or the Texas Legislature) to enjoin a litigant from pursuing an *in personam* action in a court of another *state*. *Gannon*, 706 S.W.2d at 306; *see Garcia*, 734 S.W.2d at 348-49. The principle of comity, however, requires that such injunctions should only rarely be used. As the Texas Supreme Court has held:

> The principle of comity requires that courts exercise the power to enjoin foreign suits sparingly, and only in very special circumstances.... An anti-suit injunction is appropriate in four instances: 1) to address a threat to the court's jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of suits; or 4) to protect a party from vexatious or harassing litigation.... The party seeking the injunction must show that a clear equity demands the injunction.... A single parallel proceeding in a foreign forum, however, does not constitute a multiplicity nor does it, in itself create a clear equity justifying an anti-suit injunction.

Golden Rule Ins. Co. v. Harper, 925 S.W.2d 649, 651 (Tex., 1996) (citations and internal quotation marks omitted). For the reasons set forth more fully below, equity hardly demands the

[9] Section 21A.008(k) provides: "The estate of an insurer that is injured by any willful violation of a stay provided by this section is entitled to actual damages, including costs an attorneys fees. In appropriate circumstances, the receivership court may impose additional sanctions."

prohibition of the joinder of the SDR in the Oklahoma Lawsuit if it were to be remanded. On the contrary, equity would demand just the opposite.

29. In any event, allowing a court of another state to adjudicate a simple breach of contract claim is not an affront to the jurisdiction of this Court. As MedImpact has explained, this Court would retain plenary power over the general administration of the receivership case, the property of the estate, and the treatment of MedImpact's claims against the estate. Comity would cede to the Oklahoma state court (or the arbitrators if arbitration is ordered by the Oklahoma state court) only the question whether, under the Agreement, the estate is a net creditor or a net debtor of MedImpact. The treatment of any net claim owed to MedImpact would be decided by further proceedings in this Court. *See Morris*, 329 U.S. at 548-50, 67 S. Ct. at 454-55. Indeed, the SDR has seen fit in other instances to litigate claims to recover damages from third parties in other forums, including notably the HealthNet litigation, in which the SDR obtained a judgment of approximately $110,000,000. There is every reason why the same procedure should be followed at the instance of MedImpact rather than the SDR.

B. EVEN IF THIS COURT AND/OR THE LEGISLATURE HAD THE POWER TO ENJOIN A LITIGANT'S ACCESS TO FEDERAL COURT, OR IF THIS COURT CONCLUDED—IN A REMAND CONTEXT—THAT COMITY DID NOT REQUIRE MODIFICATION OF THE STAY, THERE IS GOOD CAUSE TO MODIFY THE STAY AND THE INJUNCTION ORDER.

30. Even if this Court were to disagree with the federalism and comity arguments set forth above, it should nonetheless conclude that there is "cause" for granting relief from the stay. This Court's Injunction Order is based upon the automatic stay provision of the Insurer Receivership Act. TEX. INS. CODE § 21A.008(c); *see id.* § 21A.155(b)(2). Thus, a modification of the Injunction Order and relief from the stay should be considered as inseparable. As MedImpact has already pointed out in its original motion, § 21A.008(h)(1) allows this Court to

grant relief from the stay for "cause," including[10] the cancellation of a policy or a surety bond or undertaking if the creditor is legally entitled to such protection. There appear to be no Texas cases which address the standards for modifying or terminating an insurance receivership automatic stay to permit the commencement or continuation of litigation in a non-Texas forum. However, the language of the stay and relief from stay provisions of Chapter 21A of the Insurance Code appears to have been modeled after similar provisions of the United States Bankruptcy Code. *Cf* 11 U.S.C. § 362(d)(1). Accordingly, in the absence of decisions of a court of this state on point, it is appropriate to seek guidance from bankruptcy cases dealing with similar issues.[11]

31. In determining whether there is "cause" to grant relief from the automatic stay under 11 U.S.C. § 362(d)(1) in order to permit the commencement or continuation of litigation in another forum, bankruptcy courts typically examine the factors first expounded in *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984) and adopted in *In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1286 (2d Cir. 1990). When a party seeks relief from the stay in order to pursue an action

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[10] "Includes," "including," and their cognates are terms of enlargement rather than restriction. *Republic Ins. Co. v. Silverton Elevators, Inc.*, 493 S.W.2d 748, 752-53 (Tex. 1973). As used in a statute, "includes" or "including" followed by a specific instance means that the instance is simply a non-limiting example or illustration. *Badough v. Hale*, 22 S.W.3d 392, 395-96 (Tex. 2000).

[11] When the Legislature adopts a statute with wording substantially similar to a federal statute, it is presumed that the Legislature was aware of how federal courts had interpreted the federal enactment and, absent some indication to the contrary, that the Legislature intended to adopt that interpretation. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); *accord Quantum Chem. Corp. v. Tonnies*, 47 S.W.3d 473, 476 (Tex. 2001) (Texas Commission on Human Rights Act would be construed in accordance with the federal civil rights legislation on which it was modeled); *Thomas v. Oldham*, 895 S.W.2d 352, 356-57 (Tex. 1995) (Texas Tort Claims Act would be construed in accordance with its federal counterpart); *Blackmon v. Hansen*, 169 S.W.2d 962, 964-65 (Tex. 1943) (Texas inheritance tax statutes based on federal enactments would be given the same interpretation). This universal principle is fully applicable to state insolvency statutes modeled on federal bankruptcy legislation. *See Geraghty v. National Bank of Commerce of Seattle*, 112 P.2d 846, 849 (Wash. 1941) (provisions of Washington receivership statute dealing with setoff were taken from the Bankruptcy Act and would therefore be given the same interpretation).